UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

In the matter of: KENWORTH SALES CO. d/b/a KENWORTH SALES OF SPOKANE, Respondent, and INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 751, Charging Party.	CASE NOS. 19-CA-233407

UNION'S POST-HEARING BRIEF

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I. NATURE OF PROCEEDINGS

International Association of Machinists, District Lodge 751 ("IAM," "District 751," or "Union") filed a charge alleging unfair labor practices with Region 19 of the National Labor Relations Board ("NLRB" or "Board") against Kenworth Sales Co. d/b/a Kenworth Sales of Spokane ("Kenworth," "Company," or "Employer"). The Union filed the charge because the Employer has refused to execute a fully negotiated and ratified collective bargaining agreement ("CBA"), even though it is unmodified from the Company's last, best and final offer ("LBFO") proposed and affirmed by the Employer prior to the Union conducting its ratification vote. The Regional Director issued a complaint on March 28, 2019. A hearing was held before Administrative Law Judge Ariel L. Sotolongo on June 25, 2019.

Kenworth seeks to disavow the ratified CBA even though it is identical to the Company's LBFO to the Union. The Company apparently claims that there was not a meeting of the minds because the Company intended that its "open shop" proposal would subsequently be reformed and refined into more specific, coherent language. This intent was never expressed to the Union. The evidence at the hearing established that—despite the colloquial language used in the Company's "open shop" proposal—there was in fact a meeting of the minds as to the meaning and intent of the employer's proposal. In addition, the Employer expressly and repeatedly reaffirmed that it wanted the proposal as written to be presented to the union membership for ratification.

The Union hereby submits this post-hearing brief. As the overall factual background and legal arguments will be presented in detail by the General Counsel for

the Regional Director, the Union in this post-hearing brief highlights the evidence that establishes: (1) a meeting of the minds as to the Employer's "open shop" proposal; and (2) the Employer's insistence that the language in its offer be submitted for ratification without modification.

II. ANALYSIS OF EVIDENCE

A. The Evidence Established That, At The Time Of Ratification, The Company And The Union Understood The Employer's "Open Shop" Proposal In Exactly The Same Way.

The Employer's "open shop" proposal is certainly not the most clearly written proposal, and it does not create an open shop as that term is traditionally understood. After all, there is a union security provision in the CBA that was agreed to by the parties. It was for this reason that the Union filed its first unfair labor practice charge alleging that the Employer was engaged in regressive bargaining. *Transcript ("Tr.") 40:25-41:6, 79:14-20. See also: Tr. 86:12-19.* However, after discussion at the bargaining table it became clear that the Employer was not proposing to eliminate the union security provision, but was instead proposing non-exclusive representation: an arrangement whereby individual employee choice would drive not only union membership, but coverage under the CBA, including participation in the pension. *Tr: 80:3-81:1.* Accordingly, the Union withdrew the unfair labor practice charge alleging regressive bargaining. *Tr. 61:25-62:3.*

Union representative Steve Warren understood that this was the Employer's proposal, and he explained this to the Union's membership at ratification. This became clear when the Judge questioned Mr. Warren at length regarding his understanding of the Employer's proposal:

JUDGE SOTOLONGO: All right. The way I read this clause, the Employer seems to be proposing that those employees who do not want to be covered by the Union contract at all . . . don't have to. Isn't that a reasonable way to read that?

THE WITNESS: Yes.

JUDGE SOTOLONGO: If I recall your testimony . . . you had had consultations with the trust fund, and the trust fund had told you in no uncertain terms that that wasn't legally possible. You're either in a bargaining unit or you're not, and if you're in a bargaining unit you got to be covered by the Union contract. Wasn't that your understanding?

THE WITNESS: Yeah, that's correct.

JUDGE SOTOLONGO: So, in light of that, how do you interpret this 1.2? . . . an employer saying those who don't want to be covered by the Union contract, don't have to be. How do you reconcile those two things?

. . . what did you think you were agreeing to when . . . you put this up for a vote by the membership? What did you think it meant?

. . . What did you tell the members that this meant?

THE WITNESS: I would read and repeat this and say that the Employer proposed this language . . . they propose something that does not make sense to me because the trust doesn't allow this. I explained that to them. It doesn't make sense in some certain regards, but this is how adamant they are about this being here.

JUDGE SOTOLONGO: . . . you thought this language, they don't make any sense. Would that be accurate?

THE WITNESS: I would say that it's not unlike employers to put language they want in certain articles and to contradict due to the law or some other provision. And we try to explain that that's not it, and if they're insistent on it, I will explain to the members that's not really consistent with the way the article runs or the trust works.

. . .

JUDGE SOTOLONGO: Did you tell them that the trust had told you that at least part of it was illegal and unacceptable?

THE WITNESS: Yes.

Tr. 97:12-102:1. This exchange makes it clear that, at the time of ratification, Mr. Warren had exactly the same understanding as to the meaning and intent of the Employer's proposal as the Employer had of its own proposal. *Tr. 125:7-18 ("the open shop policy, as we've explained it is . . ." employees could elect to be union or non-union, and if non-union they would not pay dues, would not have the protections of the CBA and would not participate in the pension). See also: Tr. 125:20-126:25 (non-exclusive representation).*

This testimony from the Union and Employer lead negotiators demonstrates unequivocally that the parties did have a meeting of the minds as to the meaning and intent of the language that the parties proposed. The fact that the language drafted was not adroit does not matter, nor does it matter whether the language conflicted with laws, NLRB practices, or pension provisions or agreements—these are issues that must be left to the administration and enforcement process. The question for the Judge in this case is only whether there was a meeting of the minds, and the evidence at hearing establishes that there was a mutual understanding as to the meaning and intent of the employer's "open shop" proposal.

B. The Union Tested The Employer To Ensure That It Was Making Its Proposal With A Good Understanding As To Its Limits, And Verified That The Employer Wished To Include The Language At Issue In The Ratification Document Before Conducting The Vote.

As noted above, Mr. Warren understood that the pension trust would not accept the language at issue, or might seek to impose pension trust obligations on the Company even if individual employees elected to opt out of union representation and coverage under the CBA. *Tr. 100:23-101:1, 101:13-16, 101:24-102:1.* Mr. Warren attempted to

explain this to the Employer as well: "this was my attempt to have open discussion on where the Employer was at, as a meeting of the minds, something that would say, what are you want[ing] right here. And that's when they said, we have legal counsel." *Tr. 80:19-81:1.* After discussion across the table about the Employer's apparent effort to get out of pension liability, Mr. Warren even offered the Company's negotiator the phone number of the pension trust attorney to confirm that this language would not achieve the Employer's stated goal. *Tr. 81:2-20.* The Company chose not to follow up and communicate with the pension trust, but instead simply insisted on its proposal as written, and insisted that it be included in the Employer's offer to be voted by the Union membership. *Tr. 50:18-53:4, General Counsel's Exhibit No. 9.* The Employer's response—"we have legal counsel"—clearly conveyed that they were prepared to rely on their own understanding as to the effectiveness of the language proposed.

Mr. Warren then sent the Employer's chief negotiator, Ric Peterson, a "red copy" before ratification because "I want everyone to be clear about what we're voting on." *Tr. 51:15-16.* Mr. Warren built the "red copy" which has both the Employer and Union proposal for new language and edits as against the old CBA. *Tr. 53:15-22.* This is done "so that it's very clear to members when we're voting what changes to the documents are there." *Tr. 53:21-22.* Prior to bringing the document to the membership:

> I do request to get verification from the Employer that this does represent or is reflective of what we did talk about after negotiations, so we're on the same page, basically.

Tr. 54:2-5. Mr. Warren carefully followed this process in this case. *Tr. 54:8-9.* Specifically, he sent the "red copy" (General Counsel Exhibit 13) to Mr. Peterson by email (General Counsel Exhibit 12). *Tr. 54:10-55:13.* Mr. Peterson responded by phone

and verified that the "red copy" was correct and ready for ratification. *Tr. 55:20-56:19.* During the phone conversation, Mr. Peterson said: "yes, everything looks good to them. I said, okay, I'm going to—we're going to vote it." *Tr. 56:18-19.*

Significantly, Mr. Peterson's testimony aligns with Mr. Warren's testimony, in substance. Mr. Peterson reviewed the "red copy" on the day that he received it. *Tr. 149:21-150:4.* It contained the "open shop" language in dispute. *Tr. 150:8-11.* Mr. Peterson testified that his method of communication was different (he testified that he left a voice mail message rather than speaking with Mr. Warren directly), but confirmed the essence of the message that Mr. Warren received. Specifically, Mr. Peterson testified that he called Mr. Warren back and left a message stating, "Steve, this is our offer." *Tr. 132:14-15.* On cross-examination Mr. Peterson confirmed that his message was intended to communicate to Mr. Warren that the "red copy" was consistent with the proposal. *Tr. 150:15-23.* He did not convey anything else in the voicemail message. *Id.* At the time that Mr. Peterson left this message, he understood that Mr. Warren was poised to conduct the ratification vote based on the red copy he had just affirmed. As Mr. Peterson told the NLRB in his Affidavit: "Steven told us that he would vote the contract proposal but that the Union was not going to recommend its ratification . . .". *Tr. 149:11-20.*

The Employer now attempts to disavow its affirmation that the document was ready to vote, claiming that it intended to refine the language in Article 1.2. If that were the case, it was incumbent on the Employer to communicate that to the Union before the ratification vote. It did not do that. Having affirmed to the Union that the "red copy" represented the offer, the Employer cannot now claim that the ratified agreement does not

represent the bargain that the parties struck, however that bargain is interpreted or enforced on a going forward basis.

III. LEGAL ANALYSIS

The obligation to bargain in good faith as set forth in Section 8(d) of the National Labor Relations Act ("NLRA or "the Act") "includes an obligation to execute a written contract incorporating any agreement reached, if requested by either party." *Utility Workers Union of America*, 356 NLRB 1265 (2011). Accordingly, an employer that refuses to execute an agreed-upon contract violates Section 8(a)(5) of the Act. *H.J. Heinz Co. v NLRB*, 311 U.S. 514, 523-526 (1941). Critical to the resolution of this case: "disagreements over the interpretation of agreed-upon terms do not provide a defense for refusing to sign a contract where the parties have reached agreement on the actual terms of the contract." *Utility Workers of America*, 356 NLRB 1265 (2011); *Windward Teachers Association (Windward School)*, 346 NLRB 1148, 1150 (2006); *Teamsters Local 617 (Christian Salvesen)*, 308 NLRB 601, 603 (1992). In addition, the Board has repeatedly rejected the defense that Kenworth seeks to advance in this case:

> What is necessary to decide is whether the parties reached a meeting of the minds on all material (substantive) terms of a collective bargaining agreement. *Longshoremen ILA Local 3033 (Smith Stevedoring)*, 286 NLRB 798, 807 (1987). If so, Respondent has violated Section 8(a)(5) of the Act by refusing to execute an agreement incorporating the terms agreed to by the parties. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-526 (1941). . . .
>
> Additionally, the expression "meeting of the minds" **does not require that both parties must have an identical subjective understanding of the effect of the material terms of the contract.** *Diplomat Envelope Corp.*, 263 NLRB 525, 536 (1982); *Longshoremen ILA Local 3033, supra at 807.*

Ebon Services, 298 NLRB at 223. Accordingly, Kenworth's subjective misunderstanding about the scope and effect of the language that it proposed is irrelevant. Even if the Judge concludes that the language at issue is problematic or ambiguous in its initial formulation, the evidence at hearing established that a meeting of the minds was reached as to its intention and meaning.

The fact that the language may be inadequate (in this formulation or any formulation) to achieve the Employer's stated goal is irrelevant. Examination of the bargaining history here demonstrates that "an enforceable agreement has been reached." *North Coast Counties District Council of Carpenters (Cotati Cabinet Manufacturing Corp.)*, 197 NLRB 905 (1972). This is because, for the reasons noted above: (1) at the time of the ratification vote, the parties had the same understanding as to the intent and meaning of the language; and (2) the Union gave the Employer the opportunity to disavow or rewrite the language prior to ratification, but the Employer affirmed that the language was part of the offer to be voted.

IV. CONCLUSION

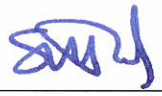
This is a case in which the Employer made a proposal that it knew the Union was poised to present to its membership for ratification. If the Employer was dissatisfied with the language that it proposed with respect to its "open shop" proposal (a proposal that remained unmodified throughout the negotiation process), it was the Employer's responsibility to tell the Union to "hold the presses" before going out to ratification vote. The Employer did not do that.

Instead, the Employer expressly confirmed that the Union had the Employer's offer at a time that the Employer knew the Union was going to conduct a vote. For the

Employer to now refuse to sign the document because it subjectively intended to refine or reform its own proposal, is not consistent with well-established Board law and the Union urges the Judge to reject it.

The Union respectfully submits that the Judge should order that the Employer's refusal to sign the CBA constitutes an unfair labor practice and that the CBA should be executed by the Employer without further delay.

Respectfully submitted this 30th day of August, 2019.



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CERTIFICATE OF SERVICE

I certify that on this 30th day of August, 2019, I caused the original of the Union's Post-Hearing Brief to be e-filed via the NLRB website through the Division of Judges, with a copy sent via electronic mail and certified first class mail, postage prepaid to:

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